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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/667,921

09/22/2003

Ioana M. RizoIU

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11/13/2008

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EXAMINER

SHAY, DAVID M

ART UNIT

PAPER NUMBER

3769

MAIL DATE

DELIVERY MODE

11/13/2008

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<p align="center"><b>Advisory Action</b> <b>Before the Filing of an Appeal Brief</b></p>	<p><b>Application No.</b> 10/667,921</p>	<p><b>Applicant(s)</b> RIZOIU ET AL.</p>	
	<p><b>Examiner</b> david shay</p>	<p><b>Art Unit</b> 3769</p>	

**--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

THE REPLY FILED October 23, 2008 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.  
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on \_\_\_\_\_. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

#### AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because  
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);  
(b) ☐ They raise the issue of new matter (see NOTE below);  
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or  
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: \_\_\_\_\_. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).  
5. ☐ Applicant's reply has overcome the following rejection(s): \_\_\_\_\_.  
6. ☐ Newly proposed or amended claim(s) \_\_\_\_\_ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).  
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.  
The status of the claim(s) is (or will be) as follows:  
Claim(s) allowed: none.  
Claim(s) objected to: none.  
Claim(s) rejected: 39-48, 52-59, 65-69 and 76-80.  
Claim(s) withdrawn from consideration: none.

#### AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).  
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).  
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

#### REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:  
See Continuation Sheet.  
12. ☐ Note the attached Information *Disclosure Statement*(s). (PTO/SB/08) Paper No(s). \_\_\_\_\_.  
13. ☐ Other: \_\_\_\_\_.

/david shay/  
Primary Examiner, Art Unit 3769

Continuation of 11. does NOT place the application in condition for allowance because: With regard to the drawing objection, the examiner apologizes for the typographical error contained in the previous advisory action, the drawing objection has been maintained due to the apparent reliance by applicant on the particular visualization capabilities that the imager is specifically claimed e.g. in claim 78 (not 74) to be adapted to do, which are not clearly illustrated in the drawing. With regard to the priority claim, applicants' the examiner also apologizes for his failure to properly consult the original application data sheet filed October 14, 2003 it is noted that this document clearly provides support for the claiming of the priority of U. S. Provisional Application No. 60/064,465 as well as the incorporation by reference, and the examiner thanks applicants for their forbearance and for specifically pointing out the contents of this document to the examiner. With regard to applicants' traversal of the examiner's taking of official notice, this traversal is noted, however, as the traversal was not timely presented and still does not "specifically point out the supposed errors in the examiner's action, which would include stating why the noticed fact is not considered to be common knowledge or well-known in the art." As required by MPEP 2144.03(C), this traversal is not convincing. The examiner notes applicants' argument with regard to taking official notice of the obviousness of something. The examiner apologizes for the inadvertent editorial error when preparing the final office action, when reproducing the phrase from the statement of official notice, the examiner erroneously inserted the word "obviousness" which was incorrect. However, as the statement of official notice and admitted prior art clearly sets forth, it is not the "obviousness of configuring the device for the removal of fat tissue in joints or the abdomen"; but of the prior art nature of so configuring such devices, as clearly set forth in the rejection. The foregoing aside, just to be sure the examiner is clear on applicants' position, applicants appear to be asserting, among other things, that the use of medical grade plastics in medical devices; the use of stainless steel to construct medical devices; the use of sterile fluids when performing surgery on internal organs are not prior art, and thus was first conceived of by applicant, and was not known to practitioners of the art of constructing medical devices, to the best applicant's knowledge, prior to the publication of applicant's application. Is this correct? Any further mention of the traversal must include an explanation of exactly what is being traversed and why. Since the taking of official notice and subsequent determination of such officially noticed facts as prior art is entirely within the procedures set forth in MPEP 2144.03(B) and (C), there is no need for the examiner to "provide a combinable reference that would be considered by one skilled in the art at the time of the invention to teach and to provide such a motivation for such determinations". Perhaps if applicants would specifically and explicitly set forth why it is believed among other things, that the use of medical grade plastics in medical devices; the use of stainless steel to construct medical devices; the use of sterile fluids when performing surgery on internal organs are not prior art, and thus was first conceived of by applicant, and was not known to practitioners of the art of constructing medical devices, to the best applicant's knowledge, prior to the publication of applicant's application, the examiner would be able to more effectively clarify this issue. With regard to the structural limitations of the claims, this has been thoroughly discussed in the previous advisory action, however, to briefly review, the combination manifests all the structural limitations set forth in the claims, regardless of applicants' envisioned but undisclosed use of such structures. The absence of a structure in one of the combined references does not render the combination not readable on the claims when the other of the references contains these limitations. For example, with regard to the alleged deficiency of Paolini, it is remedied by the cutting mechanism of the base reference, Rizoiu et al (WO '928), which coincidentally teaches the exact cutting mechanism (fluid droplets rapidly heated by a laser beam in an interaction zone) claimed by applicants, the lack of such teaching in the secondary reference to Paolini, which is only used for the tip configuration of the cannula, is of little consequence. With regard to applicants' perceived requirement for a showing of criticality on the part of the examiner, allow the examiner to assure applicants that under no circumstances are applicants required to make any showing of criticality, any such submission of any showing of criticality is left totally to the discretion of applicants, not requirement therefor is or has ever been made during the prosecution herein, and the examiner apologizes for any statement that has lead applicants to believe that any such submission is required. That having been said, the examiner's observation that certain features are non-critical is still of record and applicable to the claims. With regard to the examiner's assertions of non-criticality of certain features, applicants assert that the a prima facie case cannot be established by an assertion that "it is not critical, therefore it is obvious", however, none of the clauses discussing non-criticality of any of the claimed features are of this form, for example with regard to the situating the interaction zone beyond the end of the cannula, while this is asserted to be non-critical, it is also noted that such a configuration is well within the scope of one of ordinary skill in the art, and that the configuration provides no unexpected result, thus applicants' arguments, which are predicated on an incomplete evaluation of the examiner's basis for rejection, are not convincing.